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5 IN THE UNITED STATES DISTRICT COURT
6
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 WALTER PEREZ ESCOBAR, MARGARITA
10 GONZALEZ and FRANCISCO
11 CISNEROS-ZAVALA, individually and on
behalf of all others similarly situated,

12 Plaintiffs,

13 v.

14 WHITESIDE CONSTRUCTION
15 CORPORATION, NMS SUPPLY INC.,
J.W. CONSTRUCTION, INC., and
16 DAVID R. WHITESIDE,

17 Defendants.
18 _____/

No. C 08-01120 WHA

**ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

19 **INTRODUCTION**

20 In this putative class action alleging claims under various provisions of state and federal
21 labor laws, the parties move for preliminary approval of a proposed class settlement agreement.
22 Although the proposed settlement amount is a very low percentage of the estimated damages
23 before fees and costs, counsel have, after several attempts, sufficiently documented defendant's
24 weak financial condition to support their contention that a larger settlement might force
25 defendant into bankruptcy. They have also by and large remedied the other problems with their
26 earlier proposals. Accordingly, the joint motion for preliminary approval of the proposed
settlement is **GRANTED**, reserving on final approval later.

27 **STATEMENT**

28 Plaintiffs worked as employees of defendant corporation Whiteside Construction
Corporation, NMS Supply Inc., and/or J.W. Construction, Inc. David Whiteside is the

1 president and principal shareholder of these companies. The complaint asserts that: (i)
2 defendants failed to compensate plaintiffs with an extra hour of pay for each work shift longer
3 than four hours during which plaintiffs did not get a 10-minute rest period as required by the
4 California Labor Code; (ii) defendants willfully failed to compensate plaintiffs in accordance
5 with the California Labor Code; (iii) defendants failed to provide plaintiffs with information
6 regarding time and wages for pre-shift and post-shift work as required by the California Labor
7 Code; (iv) defendants failed to provide overtime compensation under the California Labor
8 Code; (v) defendants failed to provide minimum and overtime wages pursuant to the Fair Labor
9 Standards Act; (vi) defendants engaged in unfair practices under the California Unfair
10 Competition Law; and (vii) defendants failed to reimburse plaintiffs for costs and depreciation
11 of vehicles used to travel between the construction site and Whiteside construction yard in
12 violation of California Labor Code.

13 An August 2008 order certified the action as a collective action under the Fair Labor
14 Standards Act, but plaintiffs have yet to seek class certification of their remaining claims under
15 Rule 23. The parties reached a proposed class settlement agreement, and notice of the FLSA
16 action has yet to be sent pending the outcome of class settlement proceedings. The parties' first
17 motion for preliminary approval of class settlement was filed in January 2009, and a renewed
18 motion followed in July 2009 that addressed some but not all of the Court's concerns. In
19 September 2009, the parties submitted a revised class notice and additional declarations and
20 exhibits in support of the proposed settlement agreement to address the remaining concerns.

21 ANALYSIS

22 The parties' previous attempts for preliminary approval of class settlement have been
23 denied for several reasons, which have now been largely remedied. The parties' changes are
24 detailed below:

25 1. STEEP DISCOUNT IN SETTLEMENT.

26 The main reason the proposed settlement was initially denied is that the settlement value
27 is extremely low for the merits of the case. The damages study by plaintiffs' expert estimated
28 to be worth as much as \$9,128,831, and at a minimum to be worth \$2,650,000. The proposed

1 settlement amount is only \$444,000 — before any reduction thereof for attorney’s fees and
2 costs. That is, the proposed settlement is just five to seventeen percent of the estimated
3 damages (before fees and costs). Plaintiff’s earlier proposals did not properly justify the low
4 return to plaintiffs relative to the merits of the action. Although counsel point to some possible
5 weaknesses in plaintiffs’ case, the only reasonable justification for such an extremely low
6 settlement here is the possibility that a larger verdict would push defendants into bankruptcy.
7 With respect to the possibility of bankruptcy, the evidence the parties initially offered in support
8 of that possibility was too thin and consisted largely of speculation.

9 The renewed motion for preliminary approval submits additional evidence on
10 defendant’s poor financial condition, including declarations from Whiteside Construction’s
11 president and accountant describing the company’s financial straits, a copy of Whiteside
12 Construction’s 2008 tax return and a copy of Whiteside Construction’s balance sheet
13 documenting its financial condition for 2009 through the end of August. The tax return shows
14 the company suffered a loss of \$2,857,478 for 2008 (Smith Decl. Exh. A). The 2009 balance
15 sheet shows a working capital deficit of \$1,698,868 (Whiteside Supp. Decl. Exh. A), supporting
16 the parties’ concerns that the company may not have sufficient funds to satisfy its upcoming
17 operational expenses and continue operations. David Whiteside avers that the company’s field
18 construction workforce shrunk from 85 full-time workers in June 2008 to 38 full-time workers
19 in June 2009 (Whiteside Decl. ¶ 4). Whiteside is also suffering from a denial of usual trade
20 credit from its suppliers (Smith Decl. ¶ 4).

21 Given the strength of the case, the tiny recovery remains problematic. But the parties
22 have sufficiently documented the financial weakness of defendants and accompanying risk that
23 continued litigation might cause defendant companies to cease operating as going-concerns to
24 accept the low settlement, at least for purposes of putting the proposal out for comment.

25 **2. SCOPE OF RELEASE.**

26 The earlier proposed settlement was not fair to absent class members. It included a
27 general release as to any and all known or unknown claims that plaintiffs have against
28 defendants, and would have released all claims of any class members who failed to timely to opt

1 out of the settlement. This would have extinguished plaintiffs' rights to recover even for claims
2 completely separate from those asserted in this action. Workers who failed to receive the notice
3 (due to changes in address or other delivery problems) or who put it aside unread due to the
4 press of other matters or who simply did not prepare and file a claim on the tight timetable in
5 the notice would have lost all their rights. Why plaintiffs' counsel would have so prejudiced
6 absent class members is a mystery.

7 The new proposal has a narrower release. Class members who submit claims forms will
8 only release claims that were asserted in the complaint. To the extent that they have other
9 causes of action against defendants, they do not trade away their rights to pursue those claims
10 separately. Class members who do not opt-out of the settlement will release only the state-law
11 claims asserted in the complaint, but not any claims under the Fair Labor Standards Act, or any
12 other claims they may have against defendants.

13 3. INCENTIVE PAYMENTS.

14 The prior proposed agreement included an enhancement award for the named plaintiffs
15 as a side payment, of which the previous order disapproved. (If the settlement is not good
16 enough for the named plaintiffs, it is not good enough for the class.) Plaintiffs have removed
17 this form of "payoff," and have submitted a declaration from each named plaintiff indicating
18 that they understand they will receive no additional benefits beyond those received by the rest
19 of the class.

20 CONCLUSION

21 For the above-stated reasons, the parties' motion for preliminary approval of the
22 proposed settlement agreement is **GRANTED**, subject to further consideration thereof at the
23 settlement hearing provided for below. This order finds that even though the recovery is very
24 low, in the context of the weak financial situation of defendants it is sufficiently within the
25 range of reasonableness so that notice of the proposed settlement should be given as provided
26 for below.

27 The revised form of notice is hereby **APPROVED** with an addition as follows. The Court
28 wants the class members to have an objective opportunity to comment on the proposed

1 settlement before final approval. The notice shall be required to include the following
2 paragraph, to be bolded therein:

3 SUMMARY OF PROPOSED SETTLEMENT

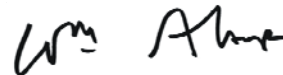
4 **If you worked for defendants Whiteside Construction Corporation, NMS Supply, Inc.,**
5 **J.W. Construction, Inc., and David R. Whiteside from February 25, 2004, through**
6 **September 15, 2008, as a carpenter, laborer, cement mason, foreman, dump-truck driver,**
7 **rebar fabricator, rebar installer, or material-delivery driver, you could get a payment**
8 **from a class-action settlement. Plaintiffs allege that defendants violated provisions of the**
9 **California Labor Code and the Fair Labor Standards Act ("FLSA") by (1) failing to**
10 **provide meal and rest periods to certain employees in compliance with California law; (2)**
11 **failing to timely pay all wages owing to certain former employees within the time periods**
12 **specified by California law; (3) failing to provide employees with accurate itemized wage**
13 **statements in compliance with California law; (4) failing to compensate certain employees**
14 **with minimum wages and/or overtime compensation under California Law and the FLSA;**
15 **and (5) failing to reimburse certain employees for business expenses. Although the Court**
16 **granted preliminary approval and required this notice, the Court has reservations about**
17 **the proposed settlement because a damages study by plaintiffs' expert estimated the value**
18 **of the lawsuit to be between \$2,650,000 and \$9,128,831, and the proposed settlement**
19 **amount is only \$444,000. The parties have argued that defendant companies are in a weak**
20 **financial situation and that a larger settlement risks pushing them into bankruptcy. The**
21 **Court recognizes that its concerns about the low value of settlement must be weighed**
22 **against these other considerations that support settlement. The Court invites the views of**
23 **class members on the fairness, adequacy and reasonableness of the proposed settlement.**
24 **There will be a fairness hearing at which the Court will consider objections, if any, to the**
25 **proposed settlement and determine whether the proposed settlement should be approved.**
26 **This hearing will be held on January 28, 2010, at 2:00 p.m. in Courtroom 9 at the United**
27 **States District Court, 450 Golden Gate Avenue, San Francisco, California 94102.**
28 **Objections and comments must be submitted to the Court on or before January 14, 2010.**

17 Within 20 days after the date of the entry of this order, defendants shall provide to
18 plaintiffs' counsel a copy of the last-known address for all Whiteside Construction Corporation,
19 NMS Supply Inc., and J.W. Construction, Inc. employees who worked in California at any time
20 during the period from February 25, 2004, through August 21, 2008. Within 10 days after
21 receipt of these addresses, plaintiffs' counsel shall update the addresses of all individuals on the
22 list provided by defendants using the National Change of Address database, and shall cause
23 copies of the notice to class substantially in the form attached hereto to be mailed to all
24 individuals on the updated list. To the extent any notices are returned to plaintiffs' counsel as
25 not deliverable, plaintiffs' counsel shall update the addresses using Lexis and shall remail them
26 within 5 days. A class member will be given 65 days after the date of mailing to submit the
27 claim form or to exercise his or her right to object to or opt out of the settlement.
28

1 The final approval hearing date shall be **JANUARY 28, 2010 AT 2:00 P.M.** The objection
2 and comment deadline shall be **JANUARY 14, 2010.**

3 **IT IS SO ORDERED.**

4
5 Dated: October 5, 2009.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE